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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 271234, consolidated with
271242, 271251, 271269, 271277

Kittitas County Cause Nos. 08-2-00195-7; -8-2-00210-4; 08-2-00224-4;
08-2-00231-7; 08-2-00239-2

Consolidated under No. 08-2-00195-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

KITTITAS COUNTY, a political subdivision of the State of Washington,
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW),
CENTRAL WASHINGTON HOME BUILDERS (CWHBA),
MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO.,
TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU,
and SON VIDA II,

Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, and
EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD,

Respondents.

**OPENING BRIEF OF
KITTITAS COUNTY**

205 West 5th Ave Room 213
Ellensburg, Washington 98926
(509)962-7520
fax (509)962-7022

Neil A. Caulkins
Deputy Prosecuting Attorney
Kittitas County

April 3rd, 2009

**KITTITAS COUNTY'S
OPENING BRIEF**

 **ORIGINAL**

GREGORY L. ZEMPEL
KITTITAS COUNTY PROSECUTOR
KITTITAS COUNTY COURTHOUSE - ROOM 213
ELLENSBURG, WASHINGTON 98926-3129
TELEPHONE 509 962-7520

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**KITTITAS COUNTY'S
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GREGORY L. ZEMPEL
KITTITAS COUNTY PROSECUTOR
KITTITAS COUNTY COURTHOUSE - ROOM 213
ELLENSBURG, WASHINGTON 98926-3129
TELEPHONE 509 962-7520

I. INTRODUCTION

Appellant Kittitas County, respondent before the Growth Management Hearings Board, submits this opening brief supporting its position that Kittitas County's (County) development regulations comport with the Growth Management Act (GMA) Ch. 36.70A RCW. This brief will demonstrate GMA compliance in four basic areas of the County's development regulations-(1) rural densities, (2) rural and agricultural conditional land uses, (3) water rights, and (4) airport areas.

II. ASSIGNMENT OF ERROR

Kittitas County asserts that the following errors in the Findings of Facts and/or Conclusions of Law support the granting of the relief requested by Petitioners in this matter. Findings of Fact numbers 3, 4, 5, 8, 9, and conclusions of law numbers 5, 6, 7, 9, 10, 11, and Invalidity findings of fact numbers 1, 2, 3, 4, 5, 6, 7, and Invalidity conclusions of law numbers 2 and 3 are not supported by substantial evidence, erroneous applications of the law, and arbitrary and capricious. Finding of fact number 3, Conclusion of Law number 2, and Invalidity Conclusion of Law number 1 are outside the jurisdiction of a hearings board and so are erroneous applications of the law to the facts and arbitrary and capricious.

1 For the reasons set forth, the Hearings Board erroneously interpreted or
2 applied the law, the Order is not supported by substantial evidence, and
3 the Hearings Board acted arbitrarily and capriciously. The County asks
4 the Court to reverse the Final Decision Order of the Eastern Washington
5 Growth Management Hearings Board in Eastern Washington Growth
6 Management Hearings Board Cause No. 07-1-0015.

7 **III. STATEMENT OF CASE**

8 In September of 2007 Futurewise, Ridge, and Kittitas County
9 Conservation (Futurewise) appealed the GMA compliance of various
10 provisions of the County's development regulations. AR 5. The Petition
11 for review listed eight issues (AR 2, 3), which for clarity purposes in this
12 matter, the County shall synthesize into four issues.

13
14 First, Futurewise challenged the County's rural densities and the
15 related protection of rural character. Specifically, issue #1 stated "Does
16 Kittitas County's failure to eliminate densities greater than one dwelling
17 unit per five acres in rural areas," including the provisions for three-acre
18 zoning, Planned Unit Developments (PUD), and cluster platting, violate
19 the GMA? AR 2. Similarly, issue #6 challenges the County's protection
20 of "the rural area" and issue #7 challenged the GMA compliance of the
21

1 County's provisions for one-time lot splits in the agricultural (CH 17.29
2 KCC) and Commercial Agricultural (CH. 17.31 KCC) designations. AR
3 3. Both of which say in their intent sections that the intent of the
4 legislation is to "preserve fertile farmland from encroachment by non-
5 agricultural land uses; and protect the rights and traditions of those
6 engaged in agriculture." KCC 17.29.010, 17.31.010.

7 Second, Futurewise challenged the appropriateness of uses allowed
8 by the County in its rural and agricultural designations. AR 2 (issues #2
9 and #3). Third, Futurewise alleged that by not requiring that all lands in
10 common ownership appear on a development application, the County
11 violated the GMA's provisions for protection of water. AR 3 (issue #4);
12 AR 1221-1223. Fourth, Futurewise alleged that by not prohibiting
13 residential development, or not limiting it "to one dwelling unit per five
14 acres," within the airport safety zones, the GMA was violated. AR 3
15 (issue #8).
16

17 Kittitas County code (KCC) provides minimum standards that are
18 in addition to other laws. KCC 17.04.020(1) provides that

19 the county shall be held to the minimum requirements for
20 the promotion of public health, safety, morals and general
21 welfare; therefore, when the title imposes a greater
22 restriction upon the use of buildings or premises, or

1 requires larger open spaces than are imposed or required by
2 other laws, resolutions, rules or regulations, the provisions
3 of this title shall control. AR 740.

4 Similarly, KCC 17.04.020(2) allows for uses administratively determined
5 to be equivalent after neighbors have had notice and opportunity to appeal
6 that determination of equivalency. AR 740.

7 Kittitas County code provides limits to the amount of land in the
8 denser zoning designations. KCC 17.04.060 provides that

9 The following percentage caps shall apply for lands under
10 the Rural land use designation as identified in the Kittitas
11 County Comprehensive Plan and Land Use Map currently
12 zoned Agricultural-3, Agricultural-5, Rural-3, and Rural 5.
13 Total acreages in each zone shall not exceed the identified
14 percentages below when compared to the overall land mass
15 available in Kittitas Count.

Zone	Percentage
Agricultural-3	3%
Agricultural-5	5%
Rural-3	3%
Rural-5	5%
AR 30.	

16 Kittitas County code provides for and regulates conditional uses.
17 KCC 17.08.550(1) states “conditional use’ means a use permitted subject
18 to conditions.” AR 556. A conditional use permit (CUP) may be issued if
19 “The Board of Adjustment shall determine that the proposed use is
20 essential or desirable to the public convenience and not detrimental or
21

1 injurious to the public health, peace, or safety or to the character of the
2 surrounding neighborhood.” KCC 17.60.010(1)¹ AR 848. KCC
3 17.60.010(2) provided that before a CUP was issued it had to be
4 determined that the proposed use at its proposed location would not be
5 economically detrimental to the County and that there were adequate
6 provisions for capital facilities and services. AR 848. KCC 17.60.020
7 provides that conditions could be imposed if they were needed “to protect
8 the best interests of the surrounding property or neighborhood or the
9 county as a whole.” AR 849.

10 Kittitas County code provides for different conditional uses in
11 different zones. KCC 17.28.130 states that “The following uses may be
12 permitted in Agricultural-3 zone subject to the conditions set forth in
13 Chapter 17.60; it is the intent of this code that such uses are subordinate to
14 the primary agricultural uses of this zone.” AR 56. That code section then
15 lists 26 potential conditional uses that would be “subordinate to the
16 primary agricultural uses of” that zone and would need to pass the
17 requirements of Ch 17.60 KCC.² KCC 17.28A.130 provides that

18
19
20 1 Ch 17.60 KCC appeared as “17.60A” in the draft that is in the record. Its provisions
21 were and continue to be unchanged as can be seen from the parenthetical language at the
22 bottom of the cited portions indicating they have not been amended since 1988.

23 2 Dairy and stock raising, hospitals, museums, public utility substations, riding

1 essentially the same list, minus community clubs, are conditional uses in
2 the Agricultural-5 zone if they "are subordinate to the primary agricultural
3 uses of " the zone and meet the requirements of Ch 17.60 KCC. AR 60,
4 61. KCC 17.29.030 provides the same list (minus community clubs but
5 plus firing ranges) of conditional uses in Agricultural-20, again provided
6 that the use "shall be subordinate to primary agricultural uses of this zone"
7 and obviously that it meet the requirements of Ch 17.60 KCC for a
8 conditional use permit. AR 63-65. The conditional uses for the Rural-3
9 designation are found at KCC 17.30.030. AR 68. Those uses, which by
10 definition would need to pass the requirements of Ch. 17.60 KCC, are
11 campgrounds, motor trail clubs, group homes and retreat centers, golf
12 courses, mining, gas and oil exploration, home occupations, temporary
13 residential use of travel trailers related to home construction, and mini-
14 warehouses subject to KCC 17.56.030. AR 68. KCC 17.30A.030
15 provides essentially the same list of conditional uses for the Rural-5
16 designation. AR 70, 71. KCC 17.56.030 provides a list of conditional
17

18
19 academies, governmental uses essential to residential neighborhoods, churches,
20 convalescent homes, day care facilities, bed and breakfast business, small room and
21 board lodging, feed mills and agricultural processing plants, kennels, livestock sales
22 yards, sand and gravel excavation, stone quarries, temporary facilities during construction
23 projects, golf courses, auctions other than livestock, private campgrounds, log sorting
24 yard, existing feedlots, guest ranches, home occupations, farm labor shelters, community
25 clubs. AR 56, 57.

1 uses for the Forest and Range Zone, which is essentially Kittitas County's
2 "Rural-20." AR 90, 91.³ The conditional uses possible in the Commercial
3 Agricultural zone are listed at KCC 17.31.030 and "shall be subordinate to
4 primary agricultural uses of this zone." AR 73.⁴ The conditional uses
5 possible in the Commercial Forest designation are listed at KCC 17.57.030
6 and include recreational facilities, sawmills, agriculture, one accessory
7 dwelling unit, trailers as temporary housing during home construction,
8 public utilities, waste treatment, temporary asphalt plants, temporary state
9 correction work camps providing labor for forestry or fire fighting, group
10 homes, and home occupations. AR 829, 830.

11 Kittitas County code allows for a one-time lot split in certain zones
12 under certain circumstances. KCC 17.29.040; 17.31.040; AR 65, 74. In
13 either the Agriculture-20 or the Commercial Agriculture zone, a smaller
14

15 3 That list adds airports, log sorting yard, sawmills, firing ranges, cemeteries, temporary
16 asphalt plants, feedlots, landfills, trailers as temporary housing, dairy and stock raising,
17 greenhouses, hospitals, museums, substations and transmission towers, riding academies,
18 schools, government uses essential to residential neighborhoods, churches, community
19 clubs, convalescent homes, day care facilities, B&B's, small room and board lodging,
20 feed mills and agricultural processing, kennels, livestock sale yards, temporary offices
21 during construction, golf courses, non-livestock auctions, private campgrounds, log
22 sorting yard, mini-warehouse, guest ranch and retreat center, home occupation, day care
23 facility, gas and oil exploration, and farm labor shelters to the list allowed for Rural-3 and
24 Rural-5. AR 90-92.

25 4 They are Farm labor shelters, small room and board lodging, feed mills and agricultural
processing plants, kennels, livestock sales yards, sand and gravel excavation, stone
quarries, temporary offices during construction, non-livestock auctions, guest ranches,
home occupations, day care facilities, B&B's, riding academies, governmental uses
essential to residential neighborhoods, and churches. AR 73, 74.

1 lot can be created, once, using the short plat process. *Id.* The resulting
2 density cannot exceed, respectively, two lots per eight or ten acres. *Id.*
3 Both provisions provide that “the intent of this provision is to encourage
4 the development of home site acreage rather than removing commercial
5 agricultural lands out of production.” *Id.*

6 The Growth Management Act specifically provides for innovative
7 techniques such as cluster platting, bonus densities, and planned unit
8 developments. RCW 36.70A.090 states that “A comprehensive plan
9 should provide for innovative land use management techniques, including
10 but not limited to, density bonuses, cluster housing, planned unit
11 developments, and the transfer of development rights.” Development
12 regulations must be consistent with and implement the comprehensive
13 plan. RCW 36.70A.040; 36.70A.120.

14
15 Planned Unit Development (PUD) is a zoning designation under
16 Kittitas County Code and is regulated in Ch. 17.36 KCC. Like any other
17 zoning designation, such a PUD can only be designated if it meets the
18 requirements of KCC 17.04.020-promotes the “public health, safety,
19 morals and general welfare” as well as complying with all other applicable
20 laws and regulations. AR 740. Additionally, property cannot be rezoned
21
22

1 in Kittitas County unless all seven criteria from KCC 17.98.020(7) are
2 met. AR 879.⁵

3 Cluster platting is regulated both in Ch. 16.09 KCC and section
4 17.08.445. KCC 16.09.010 states that the purpose of cluster platting is to
5 preserve a mix of rural densities, to preserve rural character, to provide
6 public benefit, to enable development, "to conserve water resources by
7 minimizing the development of exempt wells by encouraging group water
8 systems," to reduce the number of septic drain fields, to concentrate urban
9 densities in urban areas and to minimize rural sprawl. AR 21. Cluster
10 platting is further regulated at KCC 16.09.040(D) where it requires that
11 "all development activities authorized through this chapter shall comply
12 with all existing, applicable county development regulations, including but
13 not limited to: subdivision ordinance, zoning code, shoreline master
14

15
16 5. This applies to all rezones, not just into a PUD designation. AR 879. Those criteria
17 are "(a) The proposed amendment is compatible with the comprehensive plan; and (b)
18 The proposed amendment bears a substantial relation to the public health, safety or
19 welfare; and (c) The proposed amendment has merit and value for Kittitas County or a
20 sub-area of the county; and (d) The proposed amendment is appropriate because of
21 changed circumstances or because of a need for additional property in the proposed zone
22 or because the proposed zone is appropriate for reasonable development of the subject
23 property; and (e) The subject property is suitable for development in general
24 conformance with zoning standards for the proposed zone; and (f) The proposed
25 amendment will not be materially detrimental to the use of properties in the immediate
vicinity of the subject property; and (g) The proposed changes in use of the subject
property shall not adversely impact irrigation water deliveries to other properties." AR
879.

1 program, road standards, critical areas, and floodplain development
2 ordinance. In addition, Performance Based Cluster Platting shall not be
3 used prospectively in conjunction with the Kittitas County planned unit
4 development ordinance.” AR 23. A specific list of uses that will qualify a
5 cluster development for bonus densities is found at KCC 17.14.020.⁶

6
7
8 **6. 17.14.020 Uses permitted.**

9 All uses identified in this section shall apply to the underlying zoning for use as
10 qualifying points under Title 16.09.090 Public Benefit Rating System. For purposes of
11 identification of uses related to passive, active and formal recreation, the following uses
12 are permitted:

13 **A. Passive Recreation**

- 14 1. Conservation set-aside for bird watching and picnic areas;
15 2. Parks and playgrounds, non-motorized trails;
16 3. Uses customarily incidental to any of the uses set forth in this section;
17 and
18 4. Any use not listed which is nearly identical to a permitted use, as
19 judged by the administrative official, may be permitted. In such cases,
20 all adjacent property owners shall be given official notification for an
21 opportunity to appeal such decisions within ten working days of
22 notification pursuant to Title 15A of this code, Project Permit
23 Application Process.

24 **B. Active Recreation**

- 25 1. Ball fields;
2. Tennis courts;
3. Motorized and non-motorized trails;
4. Outdoor riding arenas;
5. Uses customarily incidental to any of the uses set forth in this section;
and
6. Any use not listed which is nearly identical to a permitted use, as
judged by the administrative official, may be permitted. In such cases,
all adjacent property owners shall be given official notification for an
opportunity to appeal such decisions within ten working days of
notification pursuant to Title 15A of this code, Project Permit
Application Process.

C. Formal Recreation

1 Kittitas County's airports are regulated at Ch. 17.58 KCC. KCC
2 17.58.010 declares that the purpose and intent of creating the airport
3 overlay zoning is "to protect the health, welfare, safety, and quality of
4 life" as well as "to ensure compatible land uses in the vicinity." AR 95.
5 KCC 17.58.020 states that "This chapter is adopted pursuant to RCW
6 36.70A.547 and 36.70A.200 which requires a county, city or town to enact
7 development regulations, to discourage the siting of incompatible land
8 uses adjacent to general aviation airports and public-use airports." AR 95.
9 KCC 17.58.030 defines "Hazard to air navigation" as a physical
10 obstruction not as a residential development. AR 96. Similarly, KCC
11 references 14 C.F.R. 77 which in turn also does not list residential
12 development as a hazard to air navigation. AR 95. KCC 17.58.040
13

-
- 15 1. Swimming pools;
 - 16 2. Club houses and golf courses (public and private);
 - 17 3. Indoor riding arenas;
 - 18 4. Uses customarily incidental to any of the uses set forth in this section;
19 and
 - 20 5. Any use not listed which is nearly identical to a permitted use, as
21 judged by the administrative official, may be permitted. In such cases,
22 all adjacent property owners shall be given official notification for an
23 opportunity to appeal such decisions within ten working days of
24 notification pursuant to Title 15A of this code, Project Permit
25 Application Process

(Ord. 2005-35, 2005)

1 provides that "The surface and safety zones are overlaid on top of the
2 existing underlying zoning, which remains in full force and effect. Where
3 the requirements imposed by the surface and safety zones conflict with the
4 requirements of the underlying zoning, the more restrictive requirements
5 shall be enforced." AR 97. KCC 17.58.060(1) provides in pertinent part
6 that "no material change shall be made in the use of land, no structure
7 shall be erected or otherwise established, and no tree shall be planted in
8 any zone created unless a permit therefore has been applied for and
9 granted. Each application for a permit shall indicate the purpose for which
10 the permit is desired, with sufficient particularity to permit it to be
11 determined whether the resulting use, structure, or tree is consistent with
12 the provision of this chapter."⁷ AR 105.

13
14 During the public comment period, Kittitas County received
15 various communications from the aviation division of WSDOT. In an
16 email dated January 23, 2008, Kerri Woehler, from the aviation division
17 of WSDOT cites to a Western Washington Growth Board case for the
18 proposition that three-acre zoning adjacent to an airport complies with the
19 GMA so long as it implements a comprehensive plan goal of discouraging

20
21 ⁷ . There are exceptions to this, but they apply to surface zones, not the safety zones
involved in this case. AR 105, 106.

1 incompatible uses around public airports. AR 966. On June 12, 2007, the
2 County received an email and attached letter from Kerri Woehler
3 expressing support for the County's regulations that "limit residential
4 density adjacent to the airports" (rather than prohibit such development) as
5 being "an important step towards protecting the county's public use
6 airports from incompatible development." AR 968. Additionally, on July
7 25, 2006, the County received an email and attached letter from Ms.
8 Woehler expressing support for the County's airport regulation which
9 contemplated residential development and contained the same overlay
10 zone applicable use chart with which the Hearings Board eventually found
11 fault. AR 972, 983.

12 The Hearings Board, having already in its 07-1-0004c case (the
13 appeal of which is linked to this appeal), determined that Kittitas County's
14 rural densities greater than one dwelling per five acres (the County's
15 three-acre zoning, cluster platting, and PUD's) violated the GMA, and so
16 "reache[d] the same conclusion here." AR 1206. It determined that the
17 County failed to develop a written record explaining how the rural element
18 harmonized the planning goals of the GMA and meets the act's
19 requirements. AR 1206. The Hearings Board found the County allowed
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1 improper uses in its rural and agricultural lands and failed to include
2 standards to protect rural character and the commercial agricultural zone.
3 AR 1213, 1218. The Hearings Board found that by failing to require the
4 listing of lands in common ownership on development applications, that
5 the County violated the GMA's requirement to protect water quality and
6 quantity. AR 1223. The Hearings Board found that the County's one-
7 time lot split was not an allowable innovative technique under the GMA
8 because it was "not one of the listed innovative techniques in RCW
9 36.70A.177(2)(c)" and it creates non-conforming lots that exceed the
10 permitted density. AR 1235.

11 Even though the Hearings Board had already determined that the
12 County's three-acre density in the airport overlay zone was GMA-
13 compliant in a previous action,⁸ it determined that *stare decisis* did not
14

15
16 8. In the Final Decision and Order in *Son Vida II v. Kittitas County*, EWGMHB Case No.
17 01-1-0017 (Jan. 23, 1998)(found at AR 989-1134), the Hearings Board stated "The
18 densities of uses permitted under the Airport Overlay Zone are appropriate when placed
19 in the context of location of the airport, the Countywide Planning Policies and the small
20 percentage of the UGA that is impacted." *Id.* at 15. The question of a potential
21 incompatibility between airport and residential use was argued at length. *Son Vida FDO*
22 at 4, 7, 11, 12, 13, 14. The Hearings Board referred to a letter from CTED that made a
23 density recommendation (which by definition is number of residences per acre), thereby
24 indicating that CTED also did not find any incompatibility between airport and
25 residential uses. *Id.* at 15. The Hearings Board found that this zoning struck "a balance
between the landowner's legitimate private property rights expectations based on current
zoning versus the need to provide safe off-airport open space areas for emergency
landing purposes." *Id.* at 16.

1 apply and that the County's regulation violated the GMA by "fail[ing] to
2 have any restriction on residential use" in safety zones 1, 2, and 5. AR
3 1246. The bulk of this determination was based upon a WSDOT
4 publication, cited in footnote 135, dated 1999-fully ten years older than
5 the information from WSDOT relied upon by Kittitas County. AR 1243,
6 1244.

7 IV. ARGUMENT

8 A. Standard of Review

9 The Hearings Board adjudicates issues of GMA compliance and
10 may invalidate noncompliant regulations. RCW 36.70A.280(1)(a), .302.
11 Petitions challenging whether a regulation complies with the GMA must
12 be filed within sixty days after publication by the legislative bodies of the
13 county. RCW 36.70A.290(2). A regulation is presumed valid, and the
14 Hearings Board "shall find compliance unless it determines that the action
15 by the state agency, county, or city is clearly erroneous in view of the
16 entire record before the board and in light of the goals and requirements of
17 [the GMA]." RCW 36.70A.320(3). To find an action clearly erroneous,
18 the Hearings Board must have a firm and definite conviction that a
19 mistake has been committed. *Lewis County v. W. Wash. Growth Mgmt.*
20
21
22

1 *Hearings Bd.*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006)(quoting *Dep't*
2 *of Ecology v. Pub Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179,
3 201, 849 P.2d 646 (1993)). The party petitioning for review of a
4 regulation has the burden of demonstrating the local government's actions
5 failed to comply with the GMA. RCW 36.70A.320(2). A Hearings Board
6 must defer to a local government's decisions that are consistent with the
7 GMA. RCW 36.70A.3201.

8 In amending RCW 36.70A.320(3) by section 20(3), chapter
9 429, Laws of 1997, the legislature intends that the boards
10 apply a more deferential standard of review to actions of
11 counties and cities than the preponderance of the evidence
12 standard provided for under existing law. In recognition of
13 the broad range of discretion that may be exercised by
14 counties and cities consistent with the requirements of this
15 chapter, the legislature intends for the boards to grant
16 deference to counties and cities in how they plan for
17 growth, consistent with the requirements and goals of this
18 chapter. Local comprehensive plans and development
19 regulations require counties and cities to balance priorities
20 and options for action in full consideration of local
21 circumstances. The legislature finds that while this chapter
22 requires local planning to take place within the framework
23 of state goals and requirements, the ultimate burden and
24 responsibility for planning, harmonizing the planning goals
25 of this chapter, and implementing a county's or city's
future rests with that community. RCW 36.70A.3201.

Judicial review of Hearings Board actions is governed by the
Administrative Procedures Act, chapter 34.05 RCW. *Quadrant Corp. v.*

1 *Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 233, 110
2 P.3d 1132 (2005). The party appealing a board's decision has the burden
3 of demonstrating the invalidity of the board's actions. RCW
4 34.05.570(1)(a).

5 The court shall grant relief from an agency order in an
6 adjudicative proceeding only if it determines that: (a) The
7 order...is in violation of constitutional provisions on its
8 face or as applied; (b) The order is outside the statutory
9 authority or jurisdiction of the agency conferred by any
10 provision of law; (c) The agency has engaged in unlawful
11 procedure or decision-making process, or has failed to
12 follow a prescribed procedure; (d) The agency has
13 erroneously interpreted or applied the law; (e) The order is
14 not supported by evidence that is substantial when viewed
15 in light of the whole record before the court, which
16 includes the agency record for judicial review,
17 supplemented by any additional evidence received by the
18 court under this chapter; (f) The agency has not decided all
19 issues requiring resolution by the agency; (g) The motion
20 for disqualification under RCW 34.05.425 or 34.12.050
21 was made and was improperly denied or, if no motion was
22 made, facts are shown to support the grant of such a motion
23 that were not known and were not reasonably discoverable
24 by the challenging party at the appropriate time for making
25 such a motion; (h) The order is inconsistent with a rule of
the agency unless the agency explains the inconsistency by
stating facts and reasons to demonstrate a rational basis for
inconsistency; or (i) The order is arbitrary or capricious.
RCW 34.05.570(3).

19 Courts review issues of law de novo. *Lewis County*, 157 Wn.2d at 498,
20 139 P.3d 1096. Substantial weight is accorded to a Hearings Board's

1 interpretation of the GMA, but the court is not bound by the Hearings
2 Board's interpretation. *City of Redmond v. Cent. Puget Sound Growth*
3 *Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). A board's
4 order must be supported by substantial evidence, meaning there is a
5 sufficient quantity of evidence to persuade a fair-minded person of the
6 truth or correctness of the order. *Id.* On mixed questions of law and fact,
7 we determine the law independently, then apply it to the facts as found by
8 the agency. *Lewis County*, 157 Wn.2d at 498, 139 P.3d 1096. "Finally, it
9 should be noted that from the beginning the GMA was riddled with
10 politically necessary omissions, internal inconsistencies, and vague
11 language. The GMA was spawned by controversy, not consensus and, as
12 a result it is not to be liberally construed." *Thurston County v. Western*
13 *Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 342, 190 P.3d 38
14 (2008)(quoting *Quadrant Corp.*, 154 Wn.2d at 232, 110 P.3d 1132 and
15 *Woods v. Kittitas County*, 162 Wn.2d 597, 612 n.8, 174 P.3d 25 (2007)).
16

17 Regulation must incorporate local circumstances. WAC 365-195-
18 020 provides in pertinent part that "Within the framework established by
19 the act, a wide diversity of local visions of the future can be
20 accommodated." WAC 365-195-060(2) provides that "To a major extent,
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1 recognition of variations and diversity is implicit in the framework of the
2 act itself, with its emphasis on a “bottom up” planning process and on
3 public participation. Such recognition is also inherent in the listing of
4 goals without assignment of priority. Accordingly, this chapter seeks to
5 accommodate regional and local differences by focusing on an analytical
6 process, instead of on specific outcomes.”⁹

7 **B. Appropriate Rural Density**

8 **1. Three-Acre Zoning Is Rural**

9 Under the GMA, development regulations must comport with and
10 implement the underlying comprehensive plan. RCW 36.70A.040. This
11 case has been linked to Court of Appeals Cause No. 265471 in which the
12 central issue is the GMA-compliance of Kittitas County’s three-acre
13 zoning in its comprehensive plan. Kittitas County has extensively briefed
14 that issue in that case, which will be heard at the same time as this one,
15 and so hereby reincorporates its arguments as to why its three-acre zoning
16 complies with the GMA and how it has developed a written record
17

18 ⁹ For further statutory direction for local variation, see generally WAC 365-195-030(1),
19 (2), and (3)(list of possible choices, not a minimum list of actions, criteria compliance not
20 a prerequisite to finding of GMA compliance); WAC 365-195-060(1), (3), (4) and
21 (5)(local variations to be reflected “local jurisdictions are expected to use a pick and
22 choose approach,” increased leeway for smaller jurisdictions); WAC 365-195-
23 070(1)(different emphasis expected); and WAC 365-195-300(2)(e)(articulate community
24 values and locally defined terms).

1 harmonizing the planning goals and other requirements of the GMA with
2 that zoning. Because development regulations must comport with and
3 implement the comprehensive plan, the same arguments and evidence
4 supporting the GMA-compliance of three acre zoning in a comprehensive
5 plan is applicable to its GMA-compliance, and even its necessary
6 presence, in the implementing development regulations.

7 The Hearings Board issued a bright-line ruling. The issues was
8 framed as “Does Kittitas County’s failure to eliminate densities greater
9 than one dwelling unit per five acres in rural areas” violate the GMA? AR
10 1197. In *Thurston County v. WWGMHB*, the Supreme Court held that
11 simply framing an issue in this manner calls for a bright-line rule and that
12 growth management hearings boards are without authority to make such
13 determinations. 164 Wn.2d 329, 358, 359, 190 P.3d 38
14 (2008)(specifically footnote 20).¹⁰ The Hearings Board failed to grant the
15 added deference or leeway owed to smaller jurisdictions contemplated by
16 WAC 365-195-060.¹¹
17

18
19 10 The Hearings Board consistently misused *Tugwell v. Kittitas County*, 90 Wn.App. 1,
20 951 P.2d 272 (1997) for the proposition of defining what is urban, when the case merely
21 stands for the proposition of what constitutes substantial evidence for a county’s rezone
22 decision.

23 11 Kittitas County is one of the few counties in Washington that is so small that, under
24 RCW 36.16.030, the attorneys in the prosecutor’s office also serve as coroners.
25

1 Kittitas County's development regulations provide for additional
2 controls on three acre-zoning that harmonize and foster the planning goals
3 of the GMA. Any zoning designation must comport with KCC 17.04.020,
4 which requires that the designation promote the "public health, safety,
5 morals and general welfare" as well as comport with all other laws and
6 regulations. AR 740. This promotes and harmonizes the health, safety,
7 and economic development concerns voiced in the intent section of the
8 GMA at RCW 36.70A.010. Similarly, KCC 17.98.020(5) requires that all
9 rezones (a) comport with the comprehensive plan, (b) bear a substantial
10 relationship to the public health, safety or welfare, (c) have merit and
11 value for the County, (d) be appropriate due to a change in circumstance
12 or reasonable development or need for more land in that zoning
13 designation, (e) that land must be suitable for development in the sought
14 zone, (f) not be a detriment to neighboring properties, and (g) not
15 adversely impact irrigation delivery. AR 879. This harmonizes the GMA
16 concerns for protection of rural character, economic development,
17 protection of resource lands, prevention of sprawl, consistency, and
18 provision for capital facilities. Finally, KCC 17.04.060 provides limits
19 upon the amount of land in Kittitas County that can be in the various
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1 smaller rural zoning designations-3 to 5 %. This is substantially less than
2 the 5.5% zoned greater than one dwelling per two acres that was not
3 found to violate the GMA in *Thurston County v. WWGMHB*, 164 Wn.2d
4 329, 356, 190 P.3d 38 (2008). The Hearings Board issued a bright-line
5 ruling by framing the issue as anything denser than one dwelling per five
6 acres in a rural area violates the GMA, and because it reached that bright-
7 line result in the 07-1-0004c case it “reach[ed] the same conclusion here.”
8 AR 1206. This decision is a misapplication of the law and beyond the
9 agency’s authority and so compels reversal.

10 **2. PUD and Cluster Platting Are Rural**

11 Kittitas County’s development regulations provide standards for
12 PUD’s and Cluster Platting that comply with the GMA. As PUD’s are a
13 zoning designation under the Kittitas County code, they must comport
14 with both KCC 17.04.020 and 17.98.020(5), and so the exact same points
15 made in the above paragraph regarding these code sections and three-acre
16 zoning apply to PUD’s. The Cluster Platting regulations specifically call
17 for the protection of rural character and prevention of sprawl as required
18 by the GMA, as well as protection of water resources by limiting the use
19 of exempt wells and septic systems. KCC 16.09.010; AR 21. Similar
20
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1 GMA-required protection of rural character can be found at KCC
2 16.09.040(D) where the requirement that cluster plats comply with all
3 existing regulations such as zoning, subdivision code, road standards,
4 shoreline management, critical areas, and flood plains is found. AR 23.
5 The Hearings Board issued a bright-line rule determining the County did
6 not have a written record harmonizing the GMA goals. In doing so, the
7 Hearings Board ignored the code provisions cited here that do that very
8 thing. A hearings board is not free to ignore such evidence; must defer to
9 county decisions supported by such evidence; and so this compels
10 reversal. *City of Arlington v. CPSGMHB*, 164 Wn.2d 768, 782, 788, 193
11 P.3d 1077 (2008).

12 **3. One-Time Lot Split Comports With GMA**

13
14 RCW 36.70A.177(2)(d) authorizes the creation of one-acre lots in
15 the agricultural zone as an innovative zoning technique. Kittitas County's
16 provisions will not create anything denser than two lots per eight or ten
17 acres, depending upon the zoning. AR 65, 75. The Hearings Board said
18 that the County's one-time lot split provision was "not one of the listed
19 innovative techniques in RCW 36.70A.177(2)(c)" and it creates non-
20 conforming lots that exceed the permitted density. AR 1235. RCW
21
22

1 36.70A.177(2) however says that “Innovative zoning techniques a county
2 or city may consider include, but are not limited to...”¹² The Hearings
3 Board made a finite list out of something the Legislature expressly
4 intended not to be finite. Additionally, because Kittitas County’s code
5 provides for the one-time lot split in these two zones, something created
6 by it, by definition, could never be non-conforming or exceeding the
7 allowed density as the Hearings Board accused the County’s regulation of
8 doing at AR 1235. The Hearings Board misapplied the law and their
9 decision is not supported by substantial evidence.

10 **C. Appropriate Uses In Rural And Agricultural Zones**

11 The Hearings Board found that the County did not have “standards
12 in place to keep intact rural character and limit the size of development”
13 for its conditional uses in the Agricultural zone. AR 1211. The Hearings
14 Board found the conditional uses in the Commercial Agricultural zone
15 were “without limitations” and that Ch. 17.31 KCC “is void as to the
16 scope and limitation of these uses, thus allowing unlimited discretion in
17 permitting them.” AR 1217.¹³ This is despite the fact that Kittitas County

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20 ¹² Similarly RCW 36.70A.090 states that comprehensive plans can use innovative
techniques “including but not limited to” those enumerated.

21 ¹³ The Hearings Board repeatedly relies upon *Vashon-Maury v. King County*, which was
disfavored in footnote 21 of *Thurston County v. WWGMHB*, 164 Wn.2d 329, 190 P.3d 38

code defines "conditional use" as "a use permitted subject to condition."
KCC 17.08.022, AR 45. This is despite the fact that KCC 17.60.010
requires that CUP be issued only if the conditional use is essential or
desirable to the public convenience; not detrimental to the public health,
safety and welfare; and not detrimental to the "character of the
surrounding neighborhood." AR 848. Additionally KCC 17.60.010
requires that CUP's not be economically detrimental to the County and
that adequate provision is made for capital facilities. *Id.* This finding of a
complete lack of standards for the County's conditional uses is also
despite KCC 17.60.020 which provides that the County can impose such
conditions needed "to protect the best interests of the surrounding property
or neighborhood." AR 849. Despite this, the Hearings Board found the
County's conditional use provisions were void of standards that would
protect rural character and limit the size of development. The Hearings
Board failed to give the deference required under RCW 36.70A.3201 and
its decision is not supported by substantial evidence, to the point of being
arbitrary and capricious.

///

(2008).

1 **D. Hearings Board Determination Regarding Water Is Erroneous**

2 **1. The Law Regarding Water Withdrawals**

3 The Surface and Ground water codes, Chapters 90.03 and 90.44
4 RCW, provide the framework by which the “power of the state to regulate
5 and control the waters within the state shall be exercised.” RCW
6 90.03.010. A county has broad powers to enact ordinances and
7 resolutions, but those powers are limited to those enactments that “are not
8 in conflict with state law.” RCW 36.32.120(7). In *State of Washington v.*
9 *Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002), the
10 Washington Supreme Court stated

11 ‘Subject to existing rights, all natural ground waters of the
12 state...are hereby declared to be public ground waters and
13 to belong to the public and to be subject to appropriation
14 for beneficial use under the terms of this chapter and not
15 otherwise.’ RCW 90.44.040; *see Hillis v. Dep’t of Ecology*,
16 131 Wash.2d 373, 383, 932 P.2d 139 (1997). RCW
17 90.44.060 provides that groundwater applications shall be
18 made in the same way as provided in the surface water
19 code in RCW 90.03.250-.340. Thus, before a groundwater
20 permit may be issued to a private party seeking to
21 appropriate groundwater, Ecology must investigate and
22 affirmatively find (1) that water is available, (2) for a
23 beneficial use, and that (3) an appropriation will not impair
24 existing rights or (4) be detrimental to public welfare. RCW
25 90.03.290. 146 Wn.2d 1, 8, 43 P.3d 4 (2002)(Emphasis
 added).

1 The Court continued "Of course, where the exemption in RCW 90.44.050
2 applies, Ecology does not engage in the usual review of a permit
3 application under RCW 90.03.290, including review addressing
4 impairment of existing rights and public interest review...The balance
5 which the Legislature struck in RCW 90.44.050 allows small exempt
6 withdrawals for domestic use." *Id.* at 16. "[T]hat is precisely what the
7 exemption is-an exemption excusing the applicant from permit
8 requirements." *Id.* at 13. An exempt well is not subject to the Department
9 of Ecology determining under RCW 90.44.070 "whether the granting of
10 any such permit will injure or damage any vested or existing right."
11 "While the exemption in RCW 90.44.050 allows appropriation of
12 groundwater and acquisition of a groundwater right without going through
13 the permit or certification procedures of chapter 90.44 RCW, once the
14 appropriator perfects the right by actual application of the water to
15 beneficial use, the right is otherwise treated in the same way as other
16 perfected rights." *Id.* at 9.

17
18 In *Campbell & Gwinn*, a developer sought to provide water for his
19 development through a series of exempt wells, each drawing less than
20 5,000 gallons per day, but collectively drawing in excess of that. *Id.* at 3.

1 The Court was concerned about what were the indicia of a development,
2 what constitutes a withdrawal, and who was seeking the exemption from
3 the water permitting process. *Id.* at 3, 10, 12, 13, 14. The indicia of a
4 development that the Court noted were that "Each lot is subject to a single
5 set of protective rules and covenants. The lots are on a dead-end road that
6 provides the only access, and a sign saying 'Rambling Brooks Estates' is
7 at the entrance to the development." *Id.* at 3. The Court held that "one
8 withdrawal may be made from more than one well." *Id.* at 15.

9 Because an exemption from permitting, like the permit itself, is
10 personal to the one seeking it, not a right that comes by virtue of land
11 ownership, the question of who is seeking to withdraw water (either
12 through permit or exemption) determines the number of exempt wells a
13 development will have.

14
15 RCW 90.03.250 states that any person may make
16 application for a permit to make an appropriation of water
17 for beneficial use, and shall not use or divert such water
18 until he has received a permit from the department as in
19 this chapter provided....The one seeking an exemption
20 from permit requirements is necessarily the one planning
21 the construction of wells or other works necessary for
22 withdrawal of water and is the one who would otherwise
23 have to have a permit before any construction commences
24 or wells are dug." *Id.* at 12, 13.

1 In that case, because the developer was providing water arrangements for
2 the development the Court found that "The developer of a subdivision is,
3 necessarily, planning for adequate water for group uses, rather than a
4 single use, and accordingly is entitled to only one 5,000 gpd exemption for
5 the project." *Id.* at 12. At footnote 4 on page 14, the Court indicated that,
6 had the developer made no provision for water, the individual
7 homeowners later could each be entitled to 5,000 gpd exemptions.

8 [I]t does make a difference whether the exemption from the
9 permitting requirements is sought by an individual
10 homeowner or a developer. Aside from the statutory
11 distinctions (the exemption is from permitting, which
12 otherwise applies to the party who seeks to construct the
13 well, and expressly applies prior to commencement of any
14 construction of the well-thus applying to the developer),
15 use of the exemption by developers will predictably and
16 greatly expand unpermitted water use in this state.
17 Individual, single family residential use of the exemption
18 (or group uses not exceeding 5,000 gpd in total) is simply
19 not comparable to what can occur if the exemption is
20 rewritten to allow for multiple wells in large developments.

21 In short, rights to appropriation of water are governed by chapters
22 90.03 and 90.44 RCW "and not otherwise." RCW 90.44.040. If an
23 application is made, the Department of Ecology makes an investigation
24 under RCW 90.03.290. If the exemption under RCW 90.44.050 applies,
25 then no such investigation occurs and the Department of Ecology's

1 authority is limited to being able to require the appropriator to furnish
2 information about the means and quantity of the withdrawal. RCW
3 90.44.050. Under no circumstances does a county have any role or
4 authority in regulating either a permitted or an exempt appropriation as
5 that authority is defined "in this chapter and not otherwise," and no such
6 county authority or role is present. RCW 90.44.040. The exemption, like
7 a permit, is personal to the one seeking it, and so, if the appropriator of an
8 exemption is the developer seeking to provide water for a development,
9 he/she is limited to one 5,000 gpd exemption,¹⁴ just as if the appropriator
10 is an individual property owner merely seeking water for his/her house,
11 they too are entitled to one 5,000 gpd exemption. 146 Wn.2d at 14.

12 **2. Hearings Board Misapplied the Law**

13
14 The Hearings Board consistently misapplied the law regarding
15 water appropriation and the GMA. Some of the most flagrant
16 misstatements of the law appear at AR 1222. "The DOE has authority
17 over exempt wells...Although DOE is the ultimate authority on just how a
18 permit for an exempt well is obtained, the County still controls its own

19
20 ¹⁴ There is nothing to indicate that a developer who owned a development in a different
21 location, served by a different road, subject to different covenants, and bearing a different
22 development name would not be entitled to another 5,000 exempt withdrawal serving that
23 development as well.

1 ground/surface water.”¹⁵ Ultimately, the Hearings Board determined that
2 by failing to require disclosure of property in common ownership on
3 development application, the County violated the GMA requirement to
4 protect water quality and quantity. AR 1223.

5 It does not make sense to require something that is already deemed
6 done. The reason for recording deeds is to give notice of the deeds’
7 contents to all the world because the act of recording is deemed to
8 accomplish that notice. RCW 65.08.030, 65.08.070. Hence, Kittitas
9 County, being part of “all the world,” is deemed to already know the
10 ownership of lands with recorded deeds within its boundaries and so will
11 not gain new knowledge from requiring that such ownership be disclosed
12 in development applications. There is also no requirement in the GMA
13 that land commonly owned be disclosed in a development application.
14

15 More importantly, because disclosure of land in common
16 ownership will have no effect upon the use of exempt wells, by not having
17 such a requirement, Kittitas County is not violating a GMA requirement to
18

19 15 As explained above, except for being able to require reporting on means and quantity
20 of withdrawal, DOE has no authority over exempt wells; there is no permit obtained from
21 an exempt well, that is what it is exempt from; and a county has no control whatsoever
22 over the appropriation of ground/surface water as such is not provided in chapters 90.03
23 or 90.44 RCW and the appropriation of water cannot be otherwise regulated. RCW
24 90.44.040.
25

1 protect water. In the fact pattern of *Campbell & Gwinn*, the number of
2 exempt withdrawals was limited to one (just the developer's) not just
3 because of his common ownership, but also because (1) the development
4 had the indicia of a development and (2) he chose to provide water for the
5 development rather than leaving that task to the individual lot purchasers.
6 The Hearings Board's order is based on the idea that, if common
7 ownership is disclosed, that alone will limit all disclosed lands to a single
8 5,000gpd exemption or require a water right.¹⁶ Land disclosed as being in
9 common ownership that does not have the indicia of being part of the
10 development would not be considered under the same withdrawal.
11 Similarly, if the *Campbell & Gwinn* developer had left the provision of
12 water to the individuals who eventually purchased the development's lots,
13 each of them would have been entitled to a 5,000 gpd exemption. So the
14 mere disclosure of land in common ownership would not have limited the
15 use of exempt wells. Additionally, there is nothing keeping each lot
16 owner in a development already served by a water system from also
17 drilling exempt wells for irrigation or stock watering purposes, or even to
18

19
20 ¹⁶ AR 1221-"The question is whether KCC 16.04 adequately protects water quality and
21 quantity as required by the GMA when this chapter provision allows multiple divisions of
22 commonly owned property which will permit multiple new wells exempt from the DOE's
23 regulations."

1 use for domestic purposes instead of their existing system, as allowed by
2 the statute. The exemptions are personal to the appropriator and not an
3 incident of real estate ownership that gets used up once and for all.

4 Simply speaking, requiring disclosure of common ownership can
5 have no effect on the use of exempt wells, and hence no effect on ground
6 or surface water. (1) Such a required disclosure would only limit a
7 developer to one 5,000 gpd exemption if all the land met the indicia of
8 development and the developer decided to provide for the development's
9 water rather than letting individual lot purchasers fend for themselves. (2)
10 This too would have no ultimate limitation upon the use of exempt wells
11 because anyone can put in an exempt well whenever they want to and
12 neither a county nor the DOE can regulate that because such
13 appropriations are regulated "under the terms of [Ch. 90.44 RCW] and not
14 otherwise." RCW 90.44.040. Hence, even after whatever group system a
15 developer who chooses to provide water for his/her development is
16 installed, those users can still, even without further subdivision, drill
17 exempt wells for purposes allowed under the statute. If they further
18 subdivide, those new lot owners also have rights to make exempt
19 appropriations merely by putting the water to beneficial use. Therefore,
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21
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1 just because the County does not require disclosure of land in common
2 ownership on development application does not mean that the County is
3 violating the GMA's requirement to protect ground and surface water as
4 such a requirement has no impact upon the use of exempt wells and the
5 impacts to ground and surface water. The Hearings Board decision is not
6 supported by substantial evidence, it is a misapplication of the law, and is
7 arbitrary and capricious.

8 **E. County's Airport Regulation Comports With GMA**

9 **1. *Stare Decisis***

10 In *Floyd v. Department of L&I*, the Washington Supreme Court
11 stated that the doctrine of *stare decisis* "means no more than the rule laid
12 down in any particular case is applicable only to the facts in that particular
13 case or to another case involving identical or substantially similar facts."
14 44 Wn.2d 560, 565, 269 P.2d 563 (1954). At page 15 of the FDO in *Son*
15 *Vida II v. Kittitas County*, EWGMHB 01-1-0017 (found at AR 989-1134),
16 the Hearings Board stated "The densities of uses permitted under the
17 Airport Overlay Zone are appropriate when placed in the context of
18 location of the airport, the Countywide Planning Policies and the small
19 percentage of the UGA that is impacted." Hence, the question of density
20
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1 has already been litigated with the result being that three-acre densities
2 were determined GMA-compliant. The question of a potential
3 incompatibility between airport and residential use was argued at length.
4 *Son Vida FDO* at 4, 7, 11, 12, 13, 14. The Hearings Board referred to a
5 letter from CTED that made a density recommendation (which by
6 definition is a ratio of residences per acre), thereby indicating that CTED
7 also did not find any incompatibility between airport and residential uses.
8 *Id.* at 15. The Hearings Board found that this zoning struck “a balance
9 between the landowner’s legitimate private property rights expectations
10 based on current zoning versus the need to provide safe off-airport open
11 space areas for emergency landing purposes.” *Id.* at 16. Obviously, the
12 Hearings Board was considering compatibility between airport and
13 residential uses and did not find them incompatible, but rather found that
14 an appropriate balance had been struck. This same issue, having already
15 been decided, must be left alone otherwise the doctrine of *stare decisis* is
16 violated.¹⁷ Having the Hearings Board at one point declare the regulation
17 GMA-compliant and later declare the unchanged regulation non-compliant
18

19
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21 ¹⁷ Indeed, having already determined a regulation to be GMA-compliant, the hearings
22 board cannot now determine otherwise. *Spokane County v. City of Spokane*, 148
23 Wn.App. 120, 125, 197 P.3d 1228 (2009).

1 hardly fosters the coordinated land use contemplated by the GMA. This
2 is precisely what the doctrine of *stare decisis* was meant to avoid.

3 **2. Hearings Board Failed To Grant Proper Deference.**

4 Despite the evidence in the record from WSDOT aviation division
5 supporting the County's airport regulations, the Hearings Board
6 determined that the County's regulation violated the GMA by "fail[ing] to
7 have any restriction on residential use" in safety zones 1, 2, and 5. AR
8 1246. The bulk of this determination was based upon a WSDOT
9 publication, cited in footnote 135, dated 1999-fully ten years older than
10 the information from WSDOT relied upon by Kittitas County. AR 1243,
11 1244.

12 The Hearings Board found the County "failed to have any
13 restriction on residential use" despite the provisions of KCC 17.58.040
14 that the underlying zoning densities still apply, and that in the event of a
15 conflict, the more restrictive designation controls. AR 97. This is despite
16 KCC 17.58.060(1)'s prohibition on building or even planting any trees in
17 the airport overlay area without first obtaining a permit. AR 105. This is
18 despite recent comments from WSDOT aviation division both supporting
19 the County's regulation as combating incompatible uses (AR 968) and
20

1 citing to a case for the proposition that three-acre densities adjacent to an
2 airport comported with the GMA so long as it was to combat incompatible
3 uses, as the County's expressly is. AR 966.

4 The Hearings Board failed to grant the proper deference to the
5 County's regulation. RCW 36.70A.3201 provides:

6 In amending RCW 36.70A.320(3) by section 20(3), chapter
7 429, Laws of 1997, the legislature intends that the boards
8 apply a more deferential standard of review to actions of
9 counties and cities than the preponderance of the evidence
10 standard provided for under existing law. In recognition of
11 the broad range of discretion that may be exercised by
12 counties and cities consistent with the requirements of this
13 chapter, the legislature intends for the boards to grant
14 deference to counties and cities in how they plan for
15 growth, consistent with the requirements and goals of this
16 chapter. Local comprehensive plans and development
17 regulations require counties and cities to balance priorities
18 and options for action in full consideration of local
19 circumstances. The legislature finds that while this chapter
20 requires local planning to take place within a framework of
21 state goals and requirements, the ultimate burden and
22 responsibility for planning, harmonizing the planning goals
23 of this chapter, and implementing a county's or city's future
24 rests with that community.

25 Similarly, in *City of Arlington v. CPSGMHB*, 164 Wn.2d 768, 193
P.3d 1077 (2008), the Court stated

There is evidence in the record supporting the County's
determination on this point, and the Board wrongly
dismissed this evidence. Because this evidence supports

1 the County's finding that the land at Island Crossing has no
2 long-term commercial significance for agricultural
3 production, the Board erred in not deferring to the County's
4 decision to redesignate the land for urban commercial
5 use...To the extent this evidence supports the County's
6 conclusion that the land was not of long-term commercial
7 significance to agricultural production, and we find that it
8 does, the Board would be required under the GMA to defer
9 to the County and affirm its decision redesignating the land
10 urban commercial. 164 Wn.2d at 782, 788.

11 In this case, there was evidence in the record supporting the
12 County's decision, but the Hearings Board disregarded it in favor of
13 evidence over ten years old. AR 1243, 1244. The Hearings Board found,
14 without support to the record, that "recommendations" in this ten-year old
15 document equaled "requirements" today. AR 1242-1244. This violates
16 the standard of deference owed the County under both RCW 36.70A.3201
17 and the *City of Arlington*. The Hearings Boards' decision is not supported
18 by substantial evidence and is a misapplication of the law.

19 V. CONCLUSION

20 Kittitas County provides for appropriate rural densities with its
21 three-acre zoning, PUD's, cluster platting, and one-time lot split
22 provisions. The County's provisions for conditional uses provides the
23 needed standards for the conditional uses possible in the difference zoning
24 designations. The County does not violate the GMA's requirement to
25

1 protect water resources by not requiring disclosure of land in common
2 ownership in development application as such a requirement would not
3 address the situation. Finally, the County's regulation in its airport
4 overlay zone has already been determined GMA-compliant and the
5 determination to the contrary ignores evidence in the record and fails to
6 grant the level of deference owed to the County's regulation. For these
7 reasons, the Hearings Board's Order should be reversed as it is not
8 supported by substantial evidence, is a misapplication of the law, and is
9 beyond the Hearings Board's authority.

10 Respectfully submitted this 3rd day of April,
11 2009.

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13 NEIL A. CAULKINS, WSBA #31759
14 Deputy Prosecuting Attorney
15 Attorney for Kittitas County
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